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DISCUSSION KICK-OFF

Cross-border surrogacy transactions (CBST):

Can consumers' states choose whether or not to regulate?

SHARON BASSAN — 20 July, 2016

Whether surrogacy is ethical or not is subject to lively debate. But so far, it is the prerogative of each sovereign state to decide whether to allow or forbid in its territory the provision of surrogacy treatments, according to its own national values. However, when citizens' personal values and interests do not go hand in hand with the chosen regulation of their home state (consumers' state), globalization enables them to exercise their reproductive freedom through the use of surrogacy markets abroad. At the moment these cross-border surrogacy transactions (CBST) are unregulated and states can choose if they wish to address the issue or not.

Establishing a CBST framework is more attractive to consumers' states that morally accept at least some sort of commercialization of surrogacy services than to states that defend a more restrictive policy and will see a contradiction between the concept of commercialized surrogacy services and their national public policy. In this post I argue that whether states allow, fund, restrict or forbid these services, regulating the global aspect and trans-border effects of surrogacy transactions is not a choice but, from a global justice perspective (*cf*. also Benvenisti; Abizadeh), rather a bioethical duty. Recent jurisprudential developments also indicate that states have positive duties.

Many developed countries have conservative regulations, banning surrogacy altogether (e.g. Australia, China, the Czech Republic, Denmark, France, Germany, Italy, Mexico, Norway, Spain, Switzerland, Taiwan, Turkey, and some U.S. states). Some have imposed partial bans (Brazil, Greece, Israel, and the UK). Some countries allow surrogacy by statute (Israel, Ukraine and Russia). Finally, some states in the US, for example, have practically a *laissez-faire* policy, permitting commercial surrogacy and the sale of egg cells. The more the access to surrogacy services is limited in a country, the more people are tempted to go abroad in order to access these services in other countries, where the policy is less restricted. However, cross-border surrogacy transactions are usually unaddressed in consumers' countries, until their citizens come back with the resulting child.

The lack of harmonization between countries with regard to the registration of the legal parenthood and nationality of the child raises administrative opportunities for consumers, but also difficulties (*cf*. e.g. Busby). Problems may arise when the child needs travelling documents and the legal parenthood of

the intended parents is yet to be determined, or when consumers' states refuse to acknowledge the status of a child born as a result of a transaction that does not meet the national public policy standards. Politically, it may be hard for countries that completely ban the supply of reproductive services to acknowledge the consequences of a market that they consider intrinsically unethical or wrong.

Some efforts are currently being made on a diplomatic level to address this problem by informing citizens about the consequences of such transactions, or asking foreign clinics that they cease providing surrogacy options to a state's citizens unless consumers had consulted with their embassy on these matters first. In order to better balance the interests of the concerned actors, the Hague Conference on Private International Law (HCCH) is currently investigating the prospects of the adoption of international instruments on cross-border surrogacy transactions. However, beyond these voluntary initiatives, I argue that states have a duty, not a choice, to regulate CBST that their citizens are involved in. The duty of surrogates' countries to regulate transactions is clear, because CBST occur in their territory and affect their own women. The duty of consumers' countries is less obvious. As I argued elsewhere, there are three ethic-legal arguments explaining why consumers' states must regulate CBST.

Risks and human rights violations

First, while offering an answer to the fertility problems of citizens of consumers' countries, evidence shows that cross-border surrogacy transactions often entail risks and human rights violations, particularly in lower-income countries, which are the common destination for CBST. The

transactions can detrimentally affect the human rights of all parties involved: Most often, surrogates' health rights and their rights over their bodies are violated and their autonomy and right to choose are not recognized. In the absence of clear international standards or coherent rules, the global industry depends on private contracts. Such contracts, which are the result of negotiations between individual parties from different countries with unequal bargaining power, tend to distribute risks and benefits unfairly. The process does not meet proper standards of informed consent to enter the process, the signing of the contract is done under questionable circumstances, the medical treatments and the extensive control to which surrogates are subjected to gravely limit their autonomy violating their right to privacy, autonomy, equality, health and making the terms of the contract are unfavourable.

Health risks entailed by CBST also have secondary impact for states that go beyond the individual transaction. Medical complications for surrogates might burden healthcare systems in destination countries where the complications occur. The children born from the procedure might receive unsatisfactory care, might have no clear nationality status due to a lack of legally recognized parenthood, or import diseases into the consumers' country, which will have to internalize these medical harms.

A duty to regulate

Second, from an international law perspective, it is the state on whose territory the legal and medical procedures are carried out that can take regulative measures regarding the conduct of the market, the regulation of clinics, and the protection of human and health right. However, from a global

justice perspective, this approach falls too short. Lower-income countries, where transactions occur, often refrain from taking action, either due to insufficient resources, or because of political unwillingness, due to a minimalist conceptions of what rights entail and what the country's commitments are or because the rulers prefer keeping their subjects impoverished, dependent, and hence exploitable (see, e.g. Chapman and Cohen). Without exempting the responsibility of destination countries, I argue that consumers' states encourage the market and should therefore *de lege ferenda* be assigned duties to regulate it.

Consumers' states restrictive policies encourage the cross-border surrogacy market. Whether states choose to fund reproductive treatments as part of their health policy, to forbid or to restrict them, these treatments are inaccessible at least to some patients who need them, unless purchased in the market. In states that do not provide reproductive services as part of their health policy, such treatments are totally left to the market sphere. However, even in states that allow the use of reproductive services, eligibility is often limited due to the need to allocate resources between medical treatments, or due to the costs of these services, which pose a financial obstacle. Citizens who cannot fulfil their reproductive freedoms nationally use the global market as some sort of compromise. Since these policies are within the authority of consumers' state, I argue that states *should* be responsible for their consequences.

Treaty obligations and recent jurisprudence

Finally, both human rights treaty law and recent decisions of the European Court of Human Rights (ECtHR) imply that in

order to find a practical solution, consumers' states might have a duty to regulate CBST to some extent.

By insisting on national values, states risk infringing international children's rights according to the Convention on the Rights of the Child (CRC), and the Convention on the Reduction of Statelessness (CRS). States must ensure that their national law is in accordance with their obligations according to the human rights regime. As part of CRC, any child has a right to be registered immediately after birth (art. 7), to preserve his or her identity, including nationality, name and family relations as recognized by law, without unlawful interference (art. 8), to enter their own country with his or her parents (art. 10), and not to be subjected to arbitrary or unlawful interference with his or her privacy and family (art. 16). The CRS states that a Contracting State shall grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality of one of his parents at the time of the person's birth was that of that State (art. 4). According to this convention, a state may refuse to register a child who is registered in the destination country or in another country. Such a refusal will not leave the child stateless, and will not necessarily be considered a violation of human rights (*cf.* also Ergas). However, when the citizenship laws in destination states do not grant citizenship to the resulting child (e.g., in Russia), a refusal by consumers' countries to register the child might violate the child's right to citizenship. Aside from all the above mentioned considerations, refusing to register children born out of cross-border surrogacy transactions would discriminate against these children compared to other genetically connected children, which is a violation of art. 2 of the convention on the Rights of the Child, and a disproportionally harsh response.

Along these lines, in recent decisions such as *Mennesson v. France*, *Labassee v. France*, and *Paradiso and Campanelli v. Italy*, the ECtHR addressed the refusal of consumer states to grant legal recognition to parent-child relationships established through CBST. At the moment, according to the ECtHR ruling, as long as the parentage is *legally* established in the country of birth, the international obligations under the European Convention of Human Rights (ECHR) of the authorities to the best interests of the child outweighs the alignment with national public policy or even with insistence on safe and secure procedures that comply with surrogates' rights.

In the *Mennesson v. France* case, the French authorities refused to acknowledge a birth certificates according to The French Register of Births, Marriages and Deaths, in spite of judgments given in the US that the intended parents were the children's legal parents. Although it was lawful in the United States, the Court of Cassation dismissed the parents' claim, holding that it was contrary to the principle of inalienability of civil status, and void on public-policy grounds under the French Civil Code. Relying primarily on the right to respect for their private and family life guaranteed by Article 8 ECHR, the couples brought the case before the ECtHR. The Court ruled that such interference would be in violation of Article 8 ECHR, unless it was 'in accordance with the law', 'pursuing a legitimate aim(s) listed in Article 8', and 'necessary in a democratic society', which was the case regarding the parents. While the parents' rights were not violated, the court found that the children's rights to respect for their private life, were. Since nationality and the right to inheritance are relevant elements of identity, the state's action was irreconcilable with the best interests of the child principle. Consequently, the state was obliged to legally

recognize a parent-child relationship established abroad through CBST.

In January 2015, another decision concerning CBST was issued by the ECtHR in the case of *Paradiso and Campanelli v. Italy*, where the parents claimed that the refusal to recognize the legal parent-child relationship and the removal of the child by Italian authorities from their care violated their right to respect for private and family life. The case of *Paradiso* was different from the above-mentioned, in the sense that the child concerned was genetically unrelated to either of the intended parents. The Italian authorities addressed it as international adoption rather than a CBST. Even as such, the Court recognized that the Italian authorities failed to take account of the child best interest principle, given there had been a *de facto* family life between the child and the intended parents. Nevertheless, although the removal of the child indeed violated the applicants' rights, the child could not be returned to the applicants as he had in the meantime settled with his foster parents and it was the child's best interest to stay with them.

In conclusion, states are free to decide whether to allow or forbid domestic surrogacy transactions. Yet, given that consumers are interested in CBST, and due to states' involvement in encouraging the cross-border market and registering the resulting children, states have at least an ethical if not even a legal duty to cooperate internationally in order to have cross-border markets regulated and monitored.

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